Supreme Court, U.S.
FILED
AUG 3 1998
OFFICE OF THE CLERK

No. 98-57

In The

Supreme Court of the United States

October Term, 1997

ALBERT D'AURIZIO,

vs. *Petitioner,*

BOROUGH OF PALISADES PARK, BOARD OF EDUCATION OF PALISADES PARK, WILLIAM MARESCA, individually, and as Mayor of Palisades Park, PAUL ALBANESE, individually and as a member of the Borough Council, MICHAEL DeBARTOLO, individually and as a member of the Board of Education, VIRGINIA DeBARTOLO, individually and as a Borough official, MARY BETH COTTRELL, individually and as a member of the Board of Education, ROBERT CARNEY, individually and as a member of the Board of Education, CAROL KILLION, individually and as a member of the Board of Education, FRANCIS VALENZUELA, individually and as a member of the Board of Education, DAVID EICHENHOLTZ, individually and as an officer of the Board of Education, THOMAS TUSCANO, individually and as a member of the Palisades Park Republican Club, SUSAN GIACOBONE, individually and as an executive member of the Palisades Park Republican Party, CARMINE VERDICCHIO, individually and as Lead Custodian of the Board of Education, JAMES NICHOLS, individually and as a officer of the Board of Education, MATTHEW NICHOLS, individually and as a member of the Board of Education, GEORGE FASCIANO, individually and as Superintendent of Board of Education, PETER MAROSE, individually and as a member of the Board of Education, and SMITH, DON, ALAMPI & D'ARGENIA, individually and as counsel for the Board of Education,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENTS, BOROUGH OF PALISADES PARK, WILLIAM MARESCA and PAUL ALBANESE

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QUESTIONS PRESENTED

I. Whether it is a denial of due process and trial by jury to apply Rule 56 summary judgment procedure consistent with accepted case law precedent.

II. Whether political affiliation constitutes a suspect class under 42 U.S.C. §1985(3).

III. Whether it was an abuse of discretion under 28 U.S.C. §1367 to dismiss state law claims without prejudice after dismissal of the federal claims.

IV. Whether Summary Judgment for Defendants was appropriate where the record fails to show that constitutionally protected conduct was a substantial and motivating factor in an employment decision and rather that the action was motivated by a legitimately perceived need to reduce budget.

V. Whether a state election by secret ballot supports application of a political vote witness privilege.

VI. The question raised by petitioner concerning dismissal as to non-moving Defendants does not apply to the Borough of Palisades Park, William Maresca and Paul Albanese, moving Defendants, and will not be addressed herein.

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Petitioner's Appendix includes all opinions below. In addition, the District Court's opinion on the political vote privilege is reported at *D'Aurizio v. Palisades Park*, 899 F.Supp. 1352 (D.N.J. 1995) and one of the District court's companion opinions on the remaining issues is reported at *D'Aurizio v. Palisades Park*, 963 F.Supp. 386 (D.N.J. 1997).

STATEMENT OF JURISDICTION

Jurisdiction is pursuant to 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The citations set forth in the Petition set forth the provisions relevant to the issues presented by the Petition.

STATEMENT OF THE CASE

Overview

Plaintiff Albert D'Aurizio was employed by the Palisades Park School Board (hereafter School Board) as a full time custodian beginning in August, 1991. Prior to that he was a candidate for a position on the Palisades Park Borough Council and lost the election in November, 1991. It should be noted that a School Board under New

Jersey law is a separate governmental entity which operates the local school district apart from the municipal corporation. In April, 1992, the voters defeated the school budget and the Council met regarding whether the School Board could cut the budget. Under New Jersey law, in the event of voter defeat of a school budget, the municipal governing body reviews the budget and suggests reductions; if the School Board does not agree, it may appeal to the State Commissioner of Education. Plaintiff alleged two secret meetings in April and in June, 1992, where a conspiracy is alleged in which Plaintiff claims it was agreed to have Plaintiff discharged because he had run for election to the Palisades Park Borough Council. On June 2, 1992, the School Board notified Plaintiff that his job would be discussed at a June 9 meeting. At that meeting, the School Board voted to eliminate one custodian and two maintenance positions, resulting in Plaintiff's termination.

There was extensive discovery in the District Court proceeding followed by Summary Judgment Motions by the various Defendants, including the Borough, Mayor Maresca and Councilman Albenese. Summary Judgment was granted on all federal claims in an opinion filed April 29, 1997. (Petitioner's Appendix, 23A to 37A). The District Court opinion dealt extensively with the factual record and granted Summary Judgment finding that the facts that could be established by that record were insufficient to support the essential elements presented by Plaintiff as a basis for his claims. It noted in part:

> " . . . D'Aurizio fails to provide the Court with sufficient evidence – i.e., creating a genuine issue as to a material fact – to support a claim

that the Borough officially adopted an unconstitutional policy to terminate D'Aurizio because of his political association. . . .

D'Aurizio's claim that the Board fired him because of his political association is without merit. . . . D'Aurizio's evidence amounts to no more than conclusionary allegations that he spoke to two individuals, one of whom was his sister-in-law, who told him the defendants secretly met and conspired to eliminate his custodial position with the Board. . . . defendants provide the Court with ample documentary and testimonial evidence demonstrating that the Borough's April 27 Budget Resolution . . . as well as the Board's prior cuts to the budget, were motivated by nothing more than a legitimately perceived need to reduce the school budget. . . .

. . . even if D'Aurizio could prove the conspiracy and injury elements of his 1985(3) claim against the defendants, he does not allege that the defendants' actions were motivated by 'racial or other class-based invidiously discriminatory animus.' Rather, here D'Aurizio is merely claiming that the defendants conspired against him, individually, because of his political association. Accordingly, D'Aurizio's section 1985(3) claim against the defendants is dismissed. . . .

. . . D'Aurizio's section 1986 claim . . . fails both because (1) he does not state a valid section 1985(3) claim against the defendants and (2) he waited for more than one year to file his claim. . . . " (Petitioner's Appendix, 30a, 31a, 32a, 33a).

The District Court dismissed the state law claims by declining pendent jurisdiction after dismissal of the federal claims. (Petitioner's Appendix, 34a). The Third Circuit affirmed on appeal all the rulings of the District Court by Order filed May 7, 1998 (Petitioner's Appendix, 1a, 2a, 3a). A review of the record in this case amply supports the decision of Judge Greenaway in the U.S. District Court, and the affirmance by the Third Circuit.

Although Plaintiff, Albert D'Aurizio, alleged a massive conspiracy of government officials, including his own sister-in-law, to remove him from his custodial position with the Board of Education, he was unable, despite extensive document discovery and the depositions of fifteen witnesses over thirty-two days, to come forward with even a scintilla of competent evidence that supported his claims. Indeed, most of the factual citations in his Petition for Certiorari are from nothing more than his own declaration before the District Court, which had insufficient factual foundation and relied heavily on personal belief, hearsay and incompetent evidence. Every citation in the Petition between A1478 and A1494 falls within this category.

Plaintiff's Employment as a Custodian

Plaintiff is a member of a large and politically active family in Palisades Park. For years, they participated in the Republican Club and School Board politics. Plaintiff's sister-in-law, Carol Killion, was President of the Board of Education. In early 1991, Plaintiff announced his candidacy as an independent for a seat on the Borough Council. In order to run as an independent, he changed

his party affiliation from a Republican to an Independent and resigned from the Palisades Park Republican Club sometime around April, 1991. (PPA168,169; "PPA" refers to the Borough's Appendix before the Court of Appeals). On May 29, 1991, after his decision to run as an independent had been made public, Plaintiff, whose sister-in-law was President of the Board of Education, was hired by the Board as a part time custodian. According to Plaintiff's deposition testimony, in May of 1991, Mayor Maresca contacted Plaintiff's wife suggesting Plaintiff drop out of the Council race. (PPA170). Despite Mayor Maresca's concern as expressed to Plaintiff's wife, Plaintiff was appointed to a part time custodial position. At Plaintiff's request, his sister-in-law, Mrs. Killion, set up a meeting between Mayor Maresca and Plaintiff to resolve this matter. Plaintiff claimed Maresca promised him a full time position with the Board of Education if he dropped out of the race, an offer Plaintiff said he refused. (PPA171, 173, 175). Nevertheless, Plaintiff became a full time custodian by vote of the Board of Education on August 27, 1991, demonstrating that his campaign for office did not prevent his obtaining that employment. As noted, he was a candidate prior to his hiring as a custodian and the election in which Plaintiff was a candidate for Municipal office was in November, 1991.

The 1992 School Board Election and Budget Process

Within months of Plaintiff becoming a full time employee of the Board of Education, it became apparent that, as the last-hired custodian, his job was jeopardized by proposed budget cuts. Candidates known as the CARE candidates ran on a platform involving the reduction of

the budget for non-essential expenses. (PPA222A). Plaintiff and other custodians recognized this and prepared a flyer against the CARE candidates and picketed the election. (PPA166). Contrary to Plaintiff's assertions, the proposed budget cut which would eliminate the last hired custodial position was in place long before any member of the Borough became involved in the budget process. Although Plaintiff alleges he was individually targeted for dismissal for political reasons, he never offered an iota of proof and created an April conspiracy out of whole cloth. The budget cuts that would affect Plaintiff's position occurred long before any conspiracy period alleged by Plaintiff. Preparation of the budget for the 92-93 school year began long before the April and June, 1992 conspiracy alleged by Plaintiff, in December, 1991 or January, 1992, when an initial draft budget was prepared by Board Administrator, David Eichenholtz. This initial document did not propose any budget cuts whatsoever, and, therefore, included the salaries of all custodians then on the staff. (PPA210,211). A list of custodial salaries produced by former School Board Finance Chair, Linda Sherwood, showed total salaries of $445,163.26 for the custodians then on staff, all of whom are identified by name. (PPA72). The preliminary budget prepared by Mr. Eichenholtz showed that this full amount was included in the first draft budget. (PPA146,147,148).[1]

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[1] In all Palisades Park Board of Education budget references herein, custodial salaries are reflected in the budget at line 610. In some budget documents, this is further broken down into sub-accounts 6101 (regular salaries), 6102 (part time salaries) and 6103 (overtime and extra help salaries). There was also a separate category for maintenance salaries, which are reflected at line 710 or 7100.

At a budget work session on February 4, 1992, cuts were made to this preliminary budget, including the elimination of one custodial and two maintenance positions. (PPA217,218). These cuts of $30,000.00 in custodial salaries and $60,000.00 in maintenance salaries were reflected on a spread sheet prepared by Mr. Eichenholtz. (PPA59-70; PPA212-213). Review of the spread sheet revealed that although line item 6101, at $480,163.00 appears greater than that shown on the initial draft budget prepared by Mr. Eichenholtz, which was $445,163.00 (PPA148), the supporting worksheet (PPA72) indicated that this $35,000.00 increase represented the addition of a Director of Maintenance position which was later eliminated as well. The February budget cuts are also reflected in the first of several budgetary submissions made by the Board of Education to the County Superintendent of Education on February 10, 1992. Current and budgeted personnel included with this submission clearly showed a reduction of one custodian (from 15 to 14) and two maintenance employees (from 4 to 2) from the then current staffing level (PPA11). Plaintiff was the custodian with the least seniority, thus his job was the one eliminated on February 4, 1992 – well before the conspiracy he alleges took place in April and June and whether he was identified by name or not.

Further cuts were made in the budget at the March 17, 1992 public hearing held by the Board of Education, but none of those cuts involved custodial or maintenance salaries, other than an additional $7,000.00 reduction in overtime funding. (PPA74-75). Plaintiff's contentions below that the budget finalized for the election on March

17, 1992 contained an increase in the custodial maintenance (line item 610) from $448,500.00 the prior year to $505,163.00 for the upcoming year, thus creating an inference that there was no budget shortage, was a mischaracterization of the budget documents and testimony of the participants in the budget process. Even though the number cited by Plaintiff $505,163.00 is an increase over the 1991-1992 budget amount, the increase was insufficient to cover the two additional custodians that had been hired (the last of which was Plaintiff) and the new Director of Maintenance position that was budgeted for $35,000.00. The salaries of the custodians then on staff totaled $445,163.36. (PPA72). There was also a total of $55,000.00 allotted for part time and extra help and $35,000.00 for the new position of Director of Maintenance. (PPA80). Thus, the total no-layoff amount for line item 610 was $535,163.00 ($35,000.00 + $445,163.00 + $55,000.00). By the time of the March 17 meeting, it had already been cut by $30,000.00, representing the elimination of one position, during the School Board's February meeting. This is evidenced by the Board's submission to the County Superintendent (PPA11, PPA24) and by the Business Administrator's budget recap submitted to the Borough Council. (PPA 59-70). These costs were incorporated into a revised budget submitted to the County Superintendent of Education and also presented to the voters at the April 7, 1992 school election. The budget finally presented to the voters was $117,500.00 less than the second draft budget of February 10, 1992, but still higher than the 91-92 school budget. At the school election on April 7, 1992, the budget was defeated. Thereafter, as mandated by N.J.S.A. 18A:22-37, the Board of

Education and the Borough Council held two meetings, the first on April 22, 1992 and the second on April 26, 1992 to discuss the budget and ways in which it could be further reduced. These were open meetings[2] not held in secret or involving any furtive purpose as suggested by Plaintiff, and are recited in the Borough's Budget Resolution adopted at an open public meeting on April 27, 1992. (PPA102-109). This Resolution proposed a total of $579,000.00 in cuts, including two additional custodial positions, the elimination of a position held by a third custodian who would apparently not be returning to work, and the elimination of the newly created Director of Maintenance position and its salary of $43,000.00. (PPA102-109).

These cuts were accepted by the School Board at its next open public meeting and the final budget was submitted to the County Superintendent of Education on June 2, 1992. (PPA42-57). The final budget reflected a reduction in custodial salaries (line 610) to $335,163.00 and maintenance salaries (line 710) to $96,663.00. This is down from the original no-layoff amounts of $480,163.00 for custodians and $156,663.00 for maintenance workers. The final numbers reflected cuts totaling $205,000.00 and the elimination of a total of five positions – two maintenance (both cut in February, 1992) and three custodians (the least senior cut in February and the next two lowest in seniority in April) – as well as the vacant position and the Director of Maintenance position. On June 9, 1992, the Board of Education began implementing the budget cuts

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[2] The April 26, 1992 meeting was a only a sub-committee meeting which was held on a Sunday evening in Borough Hall.

by laying off Plaintiff and two maintenance workers. (PPA144).

This budget process does not raise any disputed material facts and demonstrated that Plaintiff's job had already been eliminated from the budget in February; that further cuts were made after the budget was defeated; and that the Borough Defendants played no role in the school budget process until after the budget was defeated on April 7, 1992 by the voters. The allegations of conspiracy simply set forth in a declaration of the Plaintiff could not be supported by an evidential record.

The Evidential Record Did Not Support Plaintiff's Claims

Plaintiff has asserted that the 1992 budget cuts were merely a pretext for the elimination of his position. His Complaint alleged that two "conspiracy meetings" took place in April and June, 1992, at which Republican members of the Board of Education and others plotted to eliminate his position in retaliation for his 1991 independent candidacy for Borough Council. (PPA225-226). The discovery and the record produced has provided no competent evidence to support this theory. For example, as to the April meeting, Plaintiff testified that Mrs. Killion called him at 8:00 a.m. the day after the meeting. All she told him, however, was that School Board Attorney Berek Don was going to "move" him to the County. (PPA180). The only other information Plaintiff had on this meeting was a statement made by Defendant Marose, again to the effect that he had heard Plaintiff was being moved to the County (PPA181-182). Plaintiff admitted that he had no knowledge of what occurred at the April meeting other

than what he could surmise from those conversations. (PPA181-182). Speculation aside, Plaintiff's testimony is fully consistent with the legitimate purpose of the April 26, 1992 meeting which was to discuss cuts in the defeated school budget. According to Ms. Killion, as well as others, the meeting was held at Borough Hall, was open to the public, and was for the purpose of discussing the budget. (PPA188-189). It was openly memorialized in the Council's April 27 Resolution. (PPA102-109). Carol Killion testified that after this meeting she spoke to her sister, Mrs. D'Aurizio, because she knew that budget cuts imperiled her brother-in-law's job. She told Mrs. D'Aurizio that she was going to try to get Plaintiff another job. (PPA190-191). The June meeting was similarly legitimate rather than part of any conspiracy. It was a Republican meeting held to discuss the appointment of Frank Valenzuela to the Board of Education. (PPA196-204). Plaintiff's name was not even mentioned, other than by Ms. Killion in a side conversation with Paul Albanese in which she entreated him to try to do something to save Plaintiff's job, saying: "Paul, Paul, come on, this is my brother-in-law." (PPA187). Mr. Albanese's response was "well, fire them all." *Id.*[3] Plaintiff's own testimony regarding this meeting showed that his allegations are again based on nothing more than his own speculation. He testified that his wife spoke to Mrs. Killion the night of the meeting after seeing her car outside the law firm of Rotolo and Rotolo, at which the

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[3] In order to "save" Plaintiff's job, since he had the least seniority of any custodian or maintenance worker, all of the laid off workers would have had to remain for Plaintiff to be retained.

meeting was held. (PPA177). Plaintiff specifically denied being told by Mrs. Killion what had occurred at that meeting. (PPA178). He stated that he did not know what it was about until he read a complaint filed against the Board of Education by the former Director of Maintenance. *Id.* Plaintiff did assert at his deposition that Mrs. Killion confirmed his understanding of this meeting, but he could not remember how. (PPA178-179). In fact, Plaintiff could not even remember if he talked to Mrs. Killion about it. (PPA179). As for Mrs. Killion, she testified, under leading questioning from Plaintiff's attorney, to a "belief" that Plaintiff may have been terminated because he ran against the Republican party but was able to offer nothing to support such a belief. (PPA205-208). Her own testimony indicates, time after time, her own uncertainty over the truth of this belief.

> "My personal belief is it's a possibility. It could have been. I don't know . . . Yes, I believe it could be true, yes. That's the only answer I can give you. (PPA206).

In reality, the only "facts" relied upon in support of Plaintiff's conspiracy theory are nothing more than Carol Killion's efforts to keep her brother-in-law employed once she learned his job was jeopardized by School Board cuts. In addition to approaching Paul Albanese on June 7, she asked Board attorney Berek Don to arrange for a job with the County. (PPA190). She approached Mayor Maresca and asked if he could "help me out a little bit." (PPA186). The failure to adequately provide substitute employment for her brother-in-law, presumably through some government position, is now cited as evidence of their complicity in the alleged conspiracy. Furthermore,

all of Plaintiff's surmise and conjecture about conspiracy meetings in April and June, 1992 are irrelevant because the funding for Plaintiff's position, as the custodian/ maintenance worker with the least seniority, was already eliminated in February, 1992.

Plaintiff's Factual Assertions Are Not Supported By Evidence In The Record

The Petition recites an alleged factual scenario for a conspiracy to terminate Plaintiff from his custodian position at a school operated by the School Board, but presents numerous assertions that are not supported by evidence or are misstatements or overstatements when compared with the evidence. In fact, much of the factual scenario is based upon nothing more than an unsupported account of alleged facts which Plaintiff merely certified as true in a declaration, but without any evidential support in the record other than Plaintiff's beliefs. For example, on pages 4 and 5 of the Petition, Plaintiff creates the impression that after his appointment to a custodian position in August 1991, he announced his independent candidacy for Borough Council, angering officials and leading to the alleged conspiracy to terminate him from his employment. This is misleading because the record shows that Plaintiff began his candidacy as early as the Spring of 1991 and that he received his full time appointment as a custodian in August, 1991 after it was well known that he was a candidate for elective office. Thus, the actual record does not present the hostility between the candidacy and the employment that the Petition seeks to convey. The Petition at page 5 suggests that School Board candidates from the CARE group, which advocated

reductions in the school budget, ran a political campaign to eliminate patronage positions, when state law required non partisan campaigns. In fact, New Jersey law applicable at the time, N.J.S.A. 18A:14-1, did not allow grouping of candidates or party designation on the ballot, but did not and could not prohibit candidates from taking the political position that the desirable policy was to reduce the budget or eliminate patronage positions. There was nothing wrongful about any candidate having and expressing such views. Every election is political in that persons seek positions of power to advance certain policies. The Petition at page 6 charges that Linda Sherwood prepared a hit list in March of 1992 indicating jobs to be terminated. The citations in support of the assertion refer to Plaintiff's declaration of "facts" and a copy of the document. No evidence supports it was a hit list prepared in March 1992. Sherwood was deposed. She was questioned about the document. Plaintiff never included that part of her deposition in the record, nor did he ever cite it because it did not support his "hit list" prepared in March, 1992 theory. It contradicted his theory. For the purpose of this record and Plaintiff's Petition, the allegation of a March, 1992 hit list is unsupported by the evidence, and Plaintiff's certified declaration on this point was never anything more than a bald allegation. On page 7 of the Petition, Plaintiff indicates that neither the School Board nor Borough undertook any budgetary review before adopting a school budget cutting resolution. The "evidence" referenced for this conclusion was again nothing more than Plaintiff's declaration simply making an allegation and then contending it is evidence. If one considered actual evidence such as the School

Board Budget Resolution, an official government document, which Plaintiff cites as Exhibit E, and which is in the Borough's Appendix before the Court of Appeals (PPA102 to PPA109), one would discover a Resolution dated April 27, 1992 reciting (1) the budget election defeat; (2) a joint meeting of April 22, 1992 of the Borough Council and Board of Education to review the budget; (3) an effort to reduce the budget by $579,000.00; (4) specific amounts to reduce certain items; (5) and in the area of plant operation, elimination of the Director of Maintenance position, eliminate two positions from custodial staff, and other detailed reductions. At page 8 of Plaintiff's Petition, a conspiratorial meeting is alleged, but with no cited proof except another reference to Plaintiff's declaration in which he simply makes an allegation. The record contains no testimony or other evidence establishing the occurrence of such a meeting involving a conspiracy to terminate Plaintiff because he sought elective office. At page 8 of the Petition, Plaintiff claims his sister-in-law Killion testified in another law suit that a political deal had been struck between Republican Factions concerning Plaintiff's termination. However, the citation in the Petition to the deposition of Killion included in the Plaintiff's Appendix before the Court of Appeals (A1519 to 1521) contains no such reference. At page 13 of the Petition, Plaintiff refers to the deposition of Killion, in the record in his Appendix before the Court of Appeals at A1552, as quoting Councilman Albanese stating "fire him", referring to Plaintiff. In fact, the deposition reference in the record reports Albanese stating "fire them all" referring to all the custodians. This would tend to prove a motivation of general budget reduction rather than a

singling out of Plaintiff for political reasons and represents a misstatement of the record in the Petition. Also at page 13 of the Petition, Plaintiff concludes his version of events is undisputed. What the record actually demonstrates indisputably is that Plaintiff's version of events is unsupported by any competent evidence and was based upon his own certified declaration which, in reality, was nothing more than allegations and beliefs certified to be true, but based upon no competent evidence.

The District Court opinion recognized the actual worth of Plaintiff's factual contentions. The Court noted that Plaintiff announced his candidacy for Council in April, 1991 and was nevertheless subsequently appointed as a full time custodian in August, 1991; that his belief in secret conspiratorial meetings came only from alleged conversations with his sister-in-law, which was not confirmed by her at her deposition; and that documentary evidence demonstrated that the budget cuts were motivated by a perceived need to reduce the school budget. (Petitioner's Appendix 24a, 25a, 26a). This case does not present a factual scenario established by competent evidence for a framework for certiorari review of political retaliation legal standards and precedent. Rather, it is only an example of a case alleging constitutional violations which allegations could not be established by competent evidence after extensive discovery, and which fell back upon no more than a Plaintiff's theoretical allegation in the form of a certified declaration without competent support.

REASONS FOR DENYING THE WRIT

Introduction

Petitioner's application for a writ of certiorari should be denied for the following reasons under Rule 10 of the Supreme Court Rules.

1. The Third Circuit affirmed the District Court's granting of Summary Judgment to Defendants applying accepted and usual standards under F.R.C.P. 56 and related case law, requiring no need for an exercise of the Supreme Court power of supervision. Rule 10(a).

2. The decision of the Third Circuit was not in conflict with the decisions of other United States Courts of Appeals and applied accepted law and methodology, requiring no need for the Supreme Court's power of supervision. Rule 10(a).

3. The Third Circuit has decided an issue of alleged political retaliation in a manner consistent with existing precedent and accepted methodology and not in conflict with applicable decisions of the Supreme Court, requiring no need for the Supreme Court to settle an important issue of federal law. Rule 10(c).

4. The Third Circuit has appropriately determined the application of a political vote privilege to discovery seeking information on how a witness voted in a local secret ballot election, which was based upon a discovery controversy in the case, was not an advisory opinion, requiring no need for an exercise of the Supreme Court's power of supervision. Rule 10(a).

SUMMARY OF ARGUMENT

1. The Summary Judgment procedure was correctly applied to a record where Plaintiff's proofs were not competent and admissible evidence and were based upon mere belief and conjecture, whereas the Defendant's proofs were admissible official records and deposition testimony.

2. The ruling was sound that a political independent and outsider did not qualify as part of a class under 42 U.S.C. §1985(3).

3. Discretion was not abused by a dismissal without prejudice of state law claims under 28 U.S.C. §1367, after dismissal with prejudice of all federal claims.

4. The proper proof methodology and Summary Judgment procedure was applied to the political retaliation claims.

5. The application of a political vote witness privilege to a non-party witness' vote in a state secret ballot election was consistent with law and public policy.

ARGUMENT

I. PETITIONERS WAS NOT DENIED FIFTH AMENDMENT DUE PROCESS AND SEVENTH AMENDMENT TRIAL BY JURY BECAUSE THE LOWER COURTS DID PROPERLY APPLY SUMMARY JUDGMENT UNDER F.R.C.P. 56 AND CASE PRECEDENT

A. The Court Followed Authority Under F.R.C.P. 56

This District Court was both well aware of and correctly applied the Summary Judgment standard. Summary Judgment is appropriate when the moving party demonstrates that there is no genuine issue of material fact and that the evidence establishes the moving party's entitlement to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L.Ed.2d 265. 273, 106 S.Ct. 2548 (1986). Summary Judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of his case. *Id.* 477 U.S. at 322, 91 L.Ed.2d at 273, 106 S.Ct. at 2552. The party opposing Summary Judgment cannot rest on mere allegations and must instead present actual evidence that creates a genuine issue as to a material fact for trial. The mere existence of a scintilla of evidence in support of the Plaintiff's position will be insufficient to oppose a Summary Judgment Motion. If reasonable jurors could not find by a preponderance of the evidence that the Plaintiff is entitled to a verdict, Summary Judgment should be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 252, 91 L.Ed.2d 202, 211-12, 214, 106 S.Ct. 2505 (1986). The District Court clearly cited the law in this regard correctly and there can be no claim that the law

applicable was somehow misstated. (Petitioner's Appendix 27a).

Plaintiff claims certain defendants did not file a Local Rule 12G statement, but concedes Respondents did. Thus, Plaintiff's argument on that point is inapplicable. The record below relied upon by Respondents in support of their Summary Judgment Motion consisted of about 200 pages of excerpts from depositions of various witnesses and official documents from governmental entities, which had been identified in various depositions. The documents and depositions filed with the District court were certified as true copies of originals by a certification of counsel. Plaintiff argues at pages 18 and 19 of his Petition that all of this record was inadmissible hearsay and should not have been considered as evidential, citing *Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1555 (10th Cir. 1995). That case addressed the use of inadmissible hearsay contained in depositions as evidence to be considered in a Summary Judgment Motion. The ruling does not stand for the proposition that true copies of the witness' *non hearsay* testimony at the deposition or true copies of official government documents admissible at trial through F.R.E. 803.8 cannot be relied upon in a Summary Judgment proceeding. Clearly, the court can consider testimony at depositions, if the witness could so testify at trial, in a Summary Judgment Motion. If it were not so, a Summary Judgment Motion would require live testimony, defeating the purpose of the procedure. Plaintiff's Petition does not challenge the authenticity of the copies of the official records and excerpts of deposition testimony presented nor did Plaintiff raise such an objection below. If a party objects to evidential material presented in a

Summary Judgment Motion, he must move to strike them before the District Court or waive these types of arguments on appeal. *Jones v. Owens-Corning Fiberglass Corp.*, 69 F.3d 712, 718 (4th Cir. 1995); *Cases Office Machs., Inc. v. Mita Copystar Am., Inc.*, 42 F.3d 668, 682 (1st Cir. 1994).

Petitioner contends that alleged admissions of Killion concerning a conspiracy to fire Plaintiff because of his political activities in running for office are binding upon all co-conspirators and are exceptions to hearsay rules under F.R.E. 801. However, the hearsay version of events alleged to have been stated by Killion were not confirmed by her when she was deposed. As previously noted, she never made any admission statement to Plaintiff other than a personal belief, a possibility, but not a revelation of actual knowledge. (PPA206). Plaintiff himself could not confirm how or when Killion made any statements on the subject and was unsure whether he talked to her about these subjects. (PPA178, PPA179). The evidential foundation for even consideration of these allegations as admissible hearsay exceptions was, therefore, never reached. If there were evidential admissions of Killion, they would not be admissible against other Defendants absent co-conspirator status. That status is not achieved simply because Plaintiff alleges it exists. In order to apply hearsay admissions against others, the party seeking admission must show by competent and independent evidence that it is more likely than not that (1) the conspiracy existed; (2) the declarant and the Defendant against whom the conspirator's statement is offered were members of the conspiracy; and (3) the statement was made during the course of and in furtherance of the conspiracy. *United States v. Petersen*, 611 F.2d 1313, 1330 (10th Cir.

1979), *cert. denied*, 447 U.S. 905, 64 L.Ed.2d 854, 100 S.Ct. 2985 (1980). This Rule applies to both civil and criminal cases. *Filco v. Amana Refrigeration, Inc.*, 709 F.2d 1257, 1267 (9th Cir. 1983), *cert. dismissed*, 464 U.S. 956, 78 L.Ed.2d 331, 104 S.Ct. 385 (1983). Such a conspiracy must be shown by substantial independent evidence, which means more than a mere scintilla. *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir. 1985), *cert. denied*, 474 U.S. 823, 88 L.Ed.2d 63, 106 S.Ct. 77 (1985). Plaintiff cannot establish a conspiracy by reference to an alleged hearsay admission of a party, and then attempt to use that alleged statement to prove others are co-conspirators upon whom the alleged admission can be evidentially asserted. As noted *supra* and in the District Court's opinion below, there was insufficient evidence on this point.

B. 42 U.S.C. §1985(3) Was Correctly Applied

Petitioner argues that 42 U.S.C. §1985(3) applies to political independents as a protected class. One of the elements of a deprivation cause of action under this provision of the Civil Rights Act is a purpose of depriving a class of persons of equal protection or equal privileges and immunities under the laws. *Id.; United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 828-29, 77 L.Ed.2d 1049, 1054, 103 S.Ct. 3352 (1983). A Plaintiff must prove some racial or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268-69, 122 L.Ed.2d 34, 45, 113 S.Ct. 753 (1983). The provision was not intended to apply to all tortious,

conspiratorial interference with the rights of others or to be a general federal tort law. *Griffin v. Breckenrich*, 403 U.S. 88, 101-02, 29 L.Ed.2d 338, 348, 91 S.Ct. 1790 (1971). The present case involves no more than alleged action against the activities of an individual. It is difficult to construe the statute as intended to provide a remedy for every concerted effort by one political group to nullify the influence of or do other injury to a competing group or individual by use of otherwise unlawful means. *United Brotherhood of Carpenters & Joiners v. Scott, supra*, 463 U.S. at 836, 77 L.Ed.2d at 1059. Class unquestionably connotes something more than a group of individuals who share a desire to engage in conduct the defendant disfavors, or certainly a lone individual. For example, whistle blowers do not constitute a class; women seeking abortion are not a class; and bankrupts are not a class. It was intended to apply to classes offered special protection under the equal protection clause and classes Congress was trying to protect when it enacted the Ku Klux Klan Act. *Childree v. UAP/GA Ag Chem., Inc.*, 92 F.3d 1140, 1146-47 (11th Cir. 1996). It should not be applied to political outsiders or independents as a class. *Deblasio v. Zoning Bd. of Adjustment of Township of West Amwell*, 820 F.Supp. 876, 885 (D.N.J. 1993), *rev'd on other grounds*, 53 F.3d 592 (3d Cir. 1993), *cert. denied*, 116 S.Ct. 352 (1995). The holding in this case is not inconsistent with the prior opinions of the Supreme Court and does not constitute circumstances calling for Supreme Court review.

C. The Dismissal of The Pendent Jurisdiction State Law Claims Was Within The Discretion Of The District Court

Plaintiff claims at I.D., pages 24-26 of the Petition that the lower courts misapplied the supplemental jurisdiction statute, 28 U.S.C. §1367, in dismissing the state law claims after granting Summary Judgment on all of the federal civil rights claims. The state law claims involve a claim under the State Law Against Discrimination, N.J.S.A. 10:5-1 et seq. and a claim of tortious interference with an employment relationship. The statute applicable states in relevant part:

> "(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –
>
> (3) the district court has dismissed all claims over which it has original jurisdiction . . . " 28 U.S.C. §1367(c)(3).

Plaintiff has filed a Complaint in state court subsequent to the dismissal of his federal action. He does not indicate in his Petition why pursuit of these state law claims in state court would be prejudicial or unfair to him. Nor does he indicate any reason why it would be an abuse of the District Court's discretion to have dismissed these claims without prejudice after the federal civil rights claims were dismissed with prejudice. The Petition simply suggests the wording of the opinion below may have applied a stricter standard than the exercise of discretion. Unless the circumstances of this case demonstrated such an abuse of discretion under the supplemental jurisdiction statute as to constitute a special and important reason for review as set forth in Supreme Court Rule 10, no

writ of certiorari should be granted. It is clear from the present record that no such abuse of discretion has occurred. When federal claims are disposed of, it is appropriate for pendent state law claims to be dismissed as well. *Irish Lesbian and Gay Organization v. Bratton*, 882 F.Supp. 315 (S.D.N.Y. 1995), *aff'd*, 52 F.3d 311 (2d Cir. 1995); *Mark v. Borough of Hatboro*, 856 F.Supp. 966 (E.D.Pa. 1994), *aff'd*, 51 F.3d 1137 (3d Cir. 1994), *cert. denied*, 133 L.Ed.2d 107, 116 S.Ct. 165 (1995); *Wexley v. Michigan State*, 821 F.Supp. 479 (W.D.Mich. 1993), *aff'd*, 25 F.3d 1052 (6th Cir. 1994). Whether or not to exercise jurisdiction is left to the sound discretion of the District Court. *Gary v. Long*, 59 F.3d 1391 (D.C.Cir. 1995), *cert. denied*, 133 L.Ed.2d 493, 116 S.Ct. 569 (1995). The exercise of discretion over supplemental jurisdiction may be guided by principles which guided the exercise of discretion under pendent jurisdiction. *McCullough v. Branch Banking and Trust Co.*, 844 F.Supp. 258 (E.D.N.C. 1993), *aff'd*, 35 F.3d 127 (4th Cir. 1994), *cert. denied*, 130 L.Ed.2d 1069, 115 S.Ct. 1101 (1995). Where the federal case is dismissed at the Summary Judgment stage and there was no overriding interest of judicial economy or convenience, and no apparent unfairness in dismissal without prejudice of state claims, declining to exercise supplemental jurisdiction is appropriate. *Johnson v. Cullen*, 925 F.Supp. 244 (D.Del. 1996). Where civil rights claims are dismissed, the exercise of discretion to dismiss state law claims for wrongful termination is appropriate. *Franks v. Magnolia Hosp.*, 888 F.Supp. 1310 (N.D.Miss. 1995), *aff'd*, 77 F.3d 478 (4th Cir. 1996). Thus, the ruling in the present case does not demonstrate any substantial divergence from the types of

decisions prevalent in other circuits or in any way call for Supreme Court review.

II. PETITIONER WAS NOT DENIED FIFTH AMENDMENT DUE PROCESS AND SEVENTH AMENDMENT TRIAL BY JURY BY APPLICATION OF AN IMPROPER PROOF METHODOLOGY IN AN ALLEGED POLITICAL RETALIATION CASE

Plaintiff contends that the decision below did not apply the methodology of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973) and argues that this creates a conflict with the Eighth Circuit as reflected in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993). The record in the case *sub judice* does not present such a conflict or the circumstances for the resolution of such a conflict. Both cases cited by Plaintiff involved allegations of racial discrimination in employment practices. The proof methodology discussed in *McDonnell Douglas Corp.*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973) involves the Plaintiff carrying the initial burden of establishing a prima facie case. Once a prima facie case is demonstrated, the employer must meet the burden to articulate some legitimate, nondiscriminatory reason for the employee's rejection. *Id.* 411 U.S. at 802, 36 L.Ed.2d at 677-78. *St. Mary's Honor Center*, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993) explains that in cases where the proofs can establish a prima facie case for the Plaintiff, and where the Defendant meets its burden of producing nondiscriminatory reasons for its action, the further proceedings in the case leave the full burden of persuasion with the Plaintiff of proving discrimination and this obligation

is not limited to merely proving the pretextual nature of the employer's proffered reasons. *Id.*, 125 L.Ed.2d at 418-19. The form of proof methodology requirements in the First Amendment context is noted in *Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 50 L.Ed.2d 471, 484, 97 S.Ct. 568 (1977). Plaintiff has the burden to show the conduct was constitutionally protected and that the conduct was a substantial and motivating factor in the employment decision. If this burden is met, the Defendant has the burden to show that it would have reached the same decision in the absence of the protected conduct. The Third Circuit does not reject this approach to proof methodology, but has followed and accepted it. *Robertson v. Fiore*, 62 F.3d 596, 599 (3d Cir. 1995); *Rainero v. Antus*, 943 F.Supp. 413 (D.N.J. 1996). The case *sub judice* does not present an inter circuit conflict with the Eighth Circuit. The proof methodology discussed does not nullify the Summary Judgment procedure. Summary Judgment is appropriate where the competent and admissible evidence cannot support a rational fact finder reaching a verdict for the Plaintiff. The District Court opinion held that plaintiff's proofs did not support his claim that he was fired because of his political association and consisted of no more than conclusionary allegations that he spoke to two individuals. The District Court also noted that the evidence established that the employment decision was motivated by nothing more than a legitimately perceived need to reduce the school budget. (Petitioner's Appendix 30a, 31a). The record in this regard has been noted *supra*. This case involves nothing more than a political discrimination in employment claim that could not be supported by the

record when applying the Summary Judgment standard. See, e.g., *Robertson*, 62 F.3d 596, 599 (3rd Cir. 1995); *Rainero*, 943 F.Supp. 413 (D.N.J. 1996). It does not represent a misapplication of the applicable proof methodology and presents no reason for certiorari.

III. PETITIONER WAS NOT DENIED FIFTH AMENDMENT DUE PROCESS BY APPLICATION OF A POLITICAL VOTE PRIVILEGE AGAINST DEPOSITION QUESTIONS OF A NON PARTY WITNESS INQUIRY ABOUT HER VOTE IN A SCHOOL BOARD ELECTION AND OTHER VOTING

The decision applying a political vote privilege is published at *D'Aurizio v. Borough of Palisades Park*, 899 F.Supp. 1352 (D.N.J. 1995). Susan Spohn was a Council member, was deposed, but is not a Defendant in this case. At her deposition she was asked if she voted for certain persons in the April, 1992 School Board election and whether she voted anything other than Republican in the last five years. She refused to answer the questions and privileges was asserted. The issue was presented to the court below in an effort to compel answers and the court upheld the application of privilege. Plaintiff contends this was an advisory opinion and challenges the application of a political vote privilege. It is unclear how this discovery ruling could serve to change the result in the Summary Judgment rulings below.

Since there was a witness who declined to answer certain questions regarding voting for persons for public office and since Plaintiff wished to press for the answers, there clearly was an issue and case and controversy

before the court. Certainly, the witness had a right to have her voting right privilege protected if such a right applied. A controversy in the constitutional sense is one appropriate for judicial determination, definite and concrete, touching the legal relations of parties having adverse legal interests, admitting of specific relief and a definitive determination of legal rights in an adversary proceeding. *Aetna Life Insurance Co. of Hartford, Conn. v. Haworth,* 300 U.S. 227, 240-41, 81 L.Ed. 617, 621-22, 57 S.Ct. 667 (1936). Plaintiff's claim that the decision below on the privilege issue was advisory is without merit.

F.R.E. 501 provides that privileges of a witness are governed by the common law of the United States Courts. Since this matter was a civil rights action the court below applied federal common law principles. The court cited voluminous authority for the privilege in various jurisdictions and the Supreme Court recognized its existence in proposed Evidence Rule 507. The point was also made that the political vote privilege was a logical corollary of the secret ballot; the secret ballot being central to concepts of democracy and ordered liberty. Thus, the court ruled that the principles of the common law interpreted in light of reason and experience compel the recognition of the privilege to protect from compulsory disclosure the tenor of a person's vote at a political election conducted by secret ballot unless the vote was cast illegally. Plaintiff's Petition does not present a sound basis to challenge this reasoning. His argument that particularized harm had to be shown by the witness, such as fear of political retaliation, is not convincing because the loss of the secret ballot is lost by disclosure and that is the uniform harm that is to be prevented by the privilege. No voter need

show more. If the secret ballot has value, then so does this privilege. Plaintiff's argument that a school board election is not the exercise of a political vote is specious. Such an election in New Jersey determines the election of officials who decide the school budget, the largest component of public funds raised by the property tax. These officials also determine the policies followed by the local schools, within parameters determined by law, and the hiring of administrative and teaching personnel. All of these issues, while the elections do not have party labels, certainly involve the politics of taxation and public spending at the very least. The contention that such elections are not worthy of a political vote privilege should be rejected. Accordingly, this issue does not provide a basis for granting certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be denied in this matter.

Respectfully submitted,

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